IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 506 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MINABEN MERABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 506 of 1993

MR AD SHAH for Petitioners No. 1-2

MR KC SHAH,APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 16/01/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE KSHITIJ R.VYAS)

1. The appellants who are the original accused nos. 1 and 2, in this appeal, have challenged the judgment and order of conviction dated 2.4.1993 passed in Sessions Case No. 29 of 1986 by the learned Addl. Sessions Judge, Bhavnagar, convicting them for offence punishable under section 302 read with section 34 of the IPC and sentencing to undergo R.I.for life.It may be stated that the original accused no.3 who was charged for offence punishable under section 323 of IPC was also tried along with the appellants. However, the learned Addl. Sessions Judge, Bhavnagar acquitted him by the impugned judgment. The appellants are the mother-in-law and sister-in-law of deceased Gauri while the original accused no.3 is the husband of the deceased. All the accused were tried together for causing unnatural death of the deceased. As far as the appellants are concerned, it was alleged against them that on 4.10.1985 at about 11.30 a.m., in furtherance of their common intention to commit murder, the appellant no.1 sprinkled kerosene on the deceased and the appellant no.2 ignited a match stick and set the deceased ablaze. It was alleged against the original accused no.3 that in the morning on the same day at about 9.00 o'clock, he beat the deceased with cane stick and, thus, committed an offence punishable under section 323 IPC. It is the prosecution case that the married life of the deceased with her husband was not happy and three to four months prior to the incident, she had gone to her parental home. She had returned to her in-laws house only on the evening of the day prior to the incident when her father left her upto Shihor town. It is the further prosecution case that when the husband of the deceased returned from his work and saw the deceased in the house, he did not like her entry in the house on the previous day of the incident. Not only he scolded the deceased, but also gave her slaps. On the day of the incident at about 9.00 a.m., even before going for work, the husband beat the deceased. On hearing screams for help of the deceased and on seeing the smoke coming out from the house of the appellants, Dhulabhai,PW 4 and one Bhikhabhai, the neighbours entered the house and opened the door which was bolted from inside and saw the deceased in burning condition. According to Dhulabhai, he extinguished fire by throwing quilt on the deceased. According to Dhulabhai, the deceased told him that she had committed suicide. According to Dhulabhai, none of the appellants were present in the house. The deceased was taken to Vallabhipur Hospital by the elder brother of the husband of the deceased. It appears that the father of the deceased Mangalbhai, PW 5, in the meantime, was informed who accordingly came in a tempo car. The

doctor, after giving some treatment to the deceased, referred the case to Sir T.Hospital, Bhavnagar. The doctor Muljibhai Shamjibhai, Medical Officer of Sir T.Hospital, Bhavnagar, conveyed information vide Ex. 27 to Bhavnagar 'A' Division Police Station that the deceased having burn injuries was brought and that her condition was extremely serious and asked to do the needful. PSO of Bhavnagar 'A' Division Police Station received the said information and conveyed the same to Umrala Police Station as the offence had taken place within the jurisdiction of the said police station. However, before doing so, he informed the Hospital Duty Constable Bachubhai Jorubha, PW 6 Ex.25 to record the statement of the deceased. Bachubha Jorubha, recorded the complaint of the deceased Ex.26. Necessary entries were made in the station diary in that regard vide Ex. 27. Yadi Ex. 28 was also sent to Executive Magistrate to record the statement of the deceased. Accordingly, Bhogilal Mehta, Executive Magistrate, Ex.19 reached the hospital at about 3.45 p.m. and after obtaining certificate from the concerned doctor regarding the condition of the deceased, recorded dying declaration of the deceased Ex. 21. It may be stated that in the complaint Ex. 26 recorded by the Head Constable Bachubha Jorubha as well as in the dying declaration Ex. 21 recorded by the Executive Magistrate Bhogilal Mehta, the deceased implicated the appellants by alleging that they burnt her alive. The deceased died at about 5.30 p.m on the same day. Dr. Bharat Dholakia, PW 2 Ex.18, Medical Officer of Sir T.Hospital, Bhavnagar, who performed the post-mortem of the deceased found superficial burns all over the body except soles. He opined that the cause of death was shock due to extensive burns on the body. Ramkrushna Pandya, Ex. 29, Senior Police Head Constable of Umrala Police Station, after obtaining the case papers including dying declaration, complaint, inquest panchanama etc., carried out further investigation by recording the statements of witnesses and submitted chargesheet against the accused.

2. The learned Addl. Sessions Judge framed chargesheet Ex.4 against the accused to which the accused pleaded not guilty and claimed to be tried. In their further statement under section 313 of the Code of Criminal Procedure, they denied their involvement in the case and stated that they were not present at the time of incident.

3. The learned Addl. Sessions Judge, after appreciating the evidence on record, found the appellants guilty of the charge levelled against them and convicted

them for committing murder of the deceased. The learned trial judge, however, found insufficient evidence against the original accused no.3 and, therefore, he was acquitted for offence punishable under section 323 of IPC. Hence the appeal.

4. We have heard Mr. A.D.Shah, learned Counsel appearing for the appellants and Mr. K.C.Shah, learned APP for the State, at length. We have also gone through the entire evidence on record.

5. There is no dispute to the fact that the deceased died a homicidal death. The only question to be decided in this appeal is whether the deceased committed suicide or she was done to death by burning her alive. There is no dispute to the fact that the deceased sustained superficial burns all over the body. It is also not in dispute that the appellants are convicted by the learned trial judge relying on the complaint Ex. 26 given by the deceased as well as the dying declaration Ex. 21 recorded by the Executive Magistrate.

6. Bachubha Jorubha, PW 6, Ex.25 who recorded the complaint, in his evidence, has stated that he had received Yadi regarding the burn injuries sustained by the deceased at about 3.00 p.m. when he was on duty at the Govt.Hospital. He thereafter recorded the complaint. The deceased in the complaint Ex. 26 has stated that she was residing with her husband -original accused no.3 at village Chogath of Umrala taluka with the families of two brothers of her husband and her father-in-law and mother-in-law. She had gone to her parental house at village Madhada, four months prior to the incident. She has stated that her husband was to come to village Madhada for the purpose of taking her back to village Choghat. However, he had not come and, therefore, her father Mangalbhai dropped her at Shihor and thereafter she had gone to village Choghat by bus at about 2.00 p.m. on the previous day of incident. In the evening, when her husband reached home, he scolded her by telling as to why she had come and thereafter he gave six to seven slaps to her. She has further stated that even on 4.10.1985 at about 9.00 a.m., her husband informed her that he would take her to her parental house. He had also beaten her with cane stick as well as with waist belt. Thereafter, her husband had gone to village Sodvadra and when at about 11.30 a.m. she was alone in the house, her mother-in-law Minaben and her sister-in-law Kantuben came to her. Maniben was having kerosene tin; she sprinkled kerosene on her and thereafter Shantuben ignited a match stick and set her

ablaze. On shouting for help, neighbours came there. As there were burn injuries on her eyes, she could not recognise anybody. She has alleged that her mother-in-law as well as sister-in-law caused burn injuries to her. She has further stated that she was taken by the elder brother of her husband Mohanbhai and mother-in-law Minaben to Vallabhipur hospital for the purpose of treatment and from there, she was brought to Bhavnagar Government Hospital. According to her, as she was not in good terms with her husband, the appellants had burnt her. Dying declaration Ex. 21 recorded at about 3.45 p.m. by Executive Magistrate Bhogilal Mehta, PW 3 has given almost identical version. In the dying declaration, she has not narrated the incident of beating by her husband on the previous day as well as on the day in question. Barring this, she has clearly involved the appellants in the commission of crime.

7. Learned Counsel Mr.AD Shah appearing for the appellants has challenged the complaint Ex.26 as well as dying declaration Ex.21 on various grounds. He submitted that both the documents are not free from doubt. In the submission of learned Counsel, admittedly, both the documents were recorded within one hour i.e. between 3.00 p.m. and 4.00 p.m. Mr. Shah submitted that considering the fact that all the details were stated in the complaint and considering the time taken in writing a detailed complaint and the time consumed by the Executive Magistrate in reaching the hospital and thereafter recording the dying declaration, both the documents could not have been recorded during the period as claimed by both the witnesses. Learned Counsel further submitted that there is no positive evidence on record to show that the deceased was in a proper state of mind to give version.

8. We are not impressed by any of the submissions advanced by learned Counsel for the appellants. The deceased has given more details in her complaint Ex. 26 regarding the incident of beating having taken place on the previous day of the incident in question which are the facts within the knowledge of the deceased. As per the complaint, the appellant no.1 along with her younger son had accompanied the deceased at Government Hospital, Bhavnagar. The appellant no.1, in no circumstances, would like to involve herself in commission of offence and, therefore, the complaint Ex. 26 prima facie appears to have been given by the deceased herself. It is to be noted that even though her husband himself had twice misbehaved with her prior to the incident and she was humiliated in presence of other family members, she has

not involved him in the commission of crime. If at all she wanted to involve everyone, she would not have spared her husband. Having considered the matter from this angle, it clearly appears to us that her allegations against the appellants are specific and have truth in the same.

9. Bhogilal J.Mehta, Executive Magistrate, PW 3 Ex.19, in his evidence, has also stated that he received Yadi Ex. 20 for the purpose of recording dying declaration at about 3.45 p.m. He accordingly reached the hospital; obtained certificate from the doctor regarding conscious state of mind of the deceased and then recorded dying declaration Ex.21. In the cross examination, he has admitted that he took about three to four minutes for reaching the hospital and thereafter two to three minutes in getting the information from the concerned doctor. Thus, as per the evidence of Executive Magistrate, no doubt he must have taken about six to seven minutes before recording dying declaration. Merely because he recorded time of 3.45 p.m. in the dying declaration, that fact by itself, will not make the dying declaration concocted and, therefore, unreliable. One just cannot jump to the conclusion that it is a concocted document when the dying declaration Ex. 21 is otherwise natural. There is no reason for us to reject the evidence of Executive Magistrate.

10. Dr.Muljibhai Shamjibhai, PW 1 Ex. 21, Medical Officer of Government Hospital, Bhavnagar, in no uncertain terms has certified that the deceased was conscious and able to speak and was able to reply the questions after understanding. Thus, as per the medical evidence, the deceased was not only conscious, but in a fit state of mind to give statement. Therefore, there is no reason for us to discard the dying declaration recorded by the Executive Magistrate.

11. Dhulabhai Savjibhai has been examined by the prosecution vide PW 4 Ex.22. He has stated in his evidence that on seeing the smoke coming out of the house of Vagha Mera (original accused no.3) and on hearing the screams for help, he and one Bhikhabhai rushed to the spot. The fire was extinguished by them by throwing quilt and thereafter they had gone to their house. In his cross examination, he has admitted that he was sitting on 'oata' opposite the house of the deceased half an hour prior to the incident. He had not seen anybody either coming in or going out of the house of the deceased. After he opened the door which was bolted from inside by turning the chain, according to him, the

deceased was screaming for help by telling that she wanted to commit suicide. She also told him that she had committed suicide. According to him, nobody including the appellants, was there in the house. The aforesaid version was the first version of the deceased and the same was made by the deceased before PW4 Dhulabhai. The defence has successfully brought out the said version in the cross examination of PW 4. The said version was not part of his earlier version recorded by the police. The prosecution could have sought permission to declare him hostile and/or the said witness could have been cross examined further.Thus, there was total carelessness and lethargy on the part of the prosecution. The defence obtained important admissions from the prosecution witnesses which go to the root of the case. The alleged version of the deceased before PW 4 Dhulabhai which is earlier to the complaint Ex. 26 and the dying declaration Ex.21 has made the prosecution case against the appellants weak. The Court cannot ignore the said admission made by the deceased before the prosecution witnesses by observing that PW 4 has exaggerated his evidence which is exactly done by the trial court in the instant case. In our opinion, the learned trial judge has committed an error in ignoring the important admission made by the deceased before Dhulabhai, PW 4. If the evidence of Dhulabhai is accepted, it will go to suggest that none of the accused were present at the time of offence. Thus, the evidence of Dhulabhai runs counter to prosecution case. No care was taken to examine Bhikhabhai, another neighbour who accompanied Dhulabhai though he wasone of the panchas of the panchanama of scene of offence.

12. The evidence of PW 4 Dhulabhai is required to be read along with the evidence of PW 5 Mangalbhai, father of the deceased.Mangalbhai Devabhai, PW 5 Ex.23, in his examination in chief, has stated that on being informed about the incident, he had gone there and the deceased had given the name of the appellants. He had thereafter gone home. It may be stated that the appellant no.1 in the instant case is the real sister of this witness Mangalbhai,PW5. In his case also, the defence has obtained important admissions from him in the cross examination. It is stated by him that for the purpose of maintaining permanent relations, he arranged marriage of the deceased with his own nephew. The deceased was beautiful. However, his nephew was a countryman. According to him, the deceased was not ready to marry and was finding fault with her husband as she was strong by nature. According to him, the deceased had returned to village Madhada. He, however, sent her to her in-laws

house against her wish. She had informed him not to send her, otherwise, she would take extreme steps. He has further stated that he had followed the tempo carrying the deceased to the hospital. He had made an important admission that he had asked the deceased to involve the appellant in the commission of offence. When the statement of the deceased was taken, he was standing there and he had made her to involve the appellants. In his case also, as the aforesaid admissions were not the part of earlier statement of PW 5 Mangalbhai, he could have been cross examined by the prosecution. In his case also, the prosecution has taken a casual approach by not seeking leave from the Court to declare him hostile and then to cross examine him further. Ultimately, the version of PW 5 Mangalbhai, in the cross-examination, became part of record. His instructions to the deceased to involve the appellants in the commission of offence would lead us to believe that the deceased was tutored by her own father.

13. The learned trial judge rejected the aforesaid admission made by PW 4 Mangalbhai on the ground that he could not have involved appellant no.1 being his own sister. It is difficult for us to give any explanation as to why PW 5 has involved the appellant no.1 who is his own sister. Whatever reasons or explanation which may be given at this stage would be mere conjectures and inferences. We, therefore, avoid giving any particular reason for involvement of appellants by the deceased at the instance of PW 5 Mangalbhai. The evidence of Mangalbhai, if read along with the evidence of PW4 Dhulabhai, it will suggest that the deceased was not inclined to go to her in-laws house and she was forced to go there. The deceased had, in fact, threatened her father that she would take extreme steps. The deceased, as stated above, had clearly stated before PW 4 Dhulabhai that she had committed suicide. In view of this, we are clearly of the opinion that even though the deceased gave complaint Ex. 26 and dying declaration Ex. 21 wherein she involved the appellants, the said involvement is not free from doubt as the same is at the instance of her father PW 5 Mangalbhai. On the basis of Ex. 26 as well as Ex. 21 which are nothing but tutored one and on the basis of version given by the deceased, no conviction can be based. Since two views, in the instant case, are possible, it would be hazardous and totally unsafe to convict the appellants relying on one set of circumstances and giving up the other.

14. We could have confirmed the order of conviction and sentence passed against the appellants relying on the

complaint Ex. 26 as well as dying declaration Ex. 21, but the manner in which the prosecution has conducted the case by dropping material witnesses and brought out entirely a new case in the cross examination of witnesses without declaring them hostile for the reasons best known,have made us to think about the ultimate decision in the matter. We are sorry to observe that the defence in the instant case has taken maximum advantage of the bungling having committed and permitted by the prosecution and trial court respectively.

15. In the circumstances, by giving benefit of doubt to both the appellants, we allow this appeal by quashing and setting aside the judgment and order of conviction and sentence dated 2.4.1993 passed against them in Sessions Case No. 29 of 1986, by Addl. Sessions Judge, Bhavnagar and acquit them of all the charges levelled against them. Since the appellants are already on bail, their bail-bonds shall stand cancelled. Order accordingly.

(Kshitij R.Vyas,J.)

(Akshay H.Mehta,J.)

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